SUPREME COURT, U. S.

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FILED
JAN 12 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-656

JOHN ANTHONY MASIELLO,
JOHN A. MASIELLO, JR.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The government's brief in opposition avoids or misconceives the basic points raised in the petition for a writ of certiorari. Worse, the government's brief ignores the crucial government testimony at the remand hearing on the motion to suppress which contradicts its position before this Court. This testimony is quoted and reviewed in our petition (pp. 7-12).[1] Instead, the government relies on the report opinion of the district court which also ignored this testimony. As argued in the petition, the misleading nature of the district court's opinion in this regard compounds the error of the court of appeals in not reviewing the extensive transcript of the remand hearing which it, itself, had ordered (pp. 23, 27-31).

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[1] A copy of the complete transcript of this hearing has been filed by the government with the clerk of Court.

I.

The government in response to the first argument in the petition that a search warrant was essential under the facts of this case, states, without the citation of any supporting authority, that a warrantless search may be made in connection with any arrest, even where the officers know weeks in advance the specific description of the items seized, their location and plan to seize them. This assertion by the government is contrary to the recent opinion of this Court in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971) (Pet. 18).

The government gives no recognition to the holdings of this Court that warrantless searches are *per se* unreasonable, unless falling under certain exceptions supported by *exigent* circumstances. Although an arrest usually provides the exigent circumstances for a search incidental to it, this is not true where the arrest is used primarily as a search vehicle as in the instant case. As we pointed out in our petition (pp. 7-12), the government testimony at the remand hearing makes it abundantly clear that the arrest here was a pretext for the search and that no exigency permitting a warrantless search was present:

1. A six months' investigation had been completed;
2. A detailed indictment identifying the seized check payments had been returned;
3. Specific descriptions of the checks relevant to the indictment were possessed by the investigating government officers at least two months before the raid;
4. Postal Inspector O'Neill and Assistant United States Attorney Zirin planned prior to the indict-

ment to use an arrest warrant for the purpose of making a search incident to the arrest of any indicted defendant found on the business premises; and

5. Inspector McFadden was sent to the vicinity of the business offices to be raided in advance of the other officers (for no other explainable purpose than to spot the presence of an indicted defendant), and he took with him large empty boxes to carry back seized records.

Other than stating self-serving conclusions, the government completely fails to deal with this argument in its brief.

The government further misconceives our argument when it states that we "contend that the search incident to McKeever's arrest was too broad" (Gov't Br. 5). To the contrary, the petition clearly recognizes the pre-*Chimel* status of this case and specifically disclaims raising the issue of the scope of the search[2] and the application of this Court's decisions in *Kremen* v. *United States*, 353 U.S. 346 (1957); *Williams* v. *United States*, 401 U.S. 646 (1971) and *Hill* v. *California*, 401 U.S. 797 (1971) (Pet. 13-4). Rather, the petition pointedly states that the basic question is whether, under the factual circumstances of this case, there could be any search at all without a warrant (*Id.* at 14). Consequently, the government's motive in raising a straw issue and knocking it down is unclear.

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[2] The only reference in the petition to the scope of the search appears on page 22 where it is used to support the argument that the arrest was a pretext for the making of an exploratory search which would not have been permitted under a search warrant.

II.

The government also misapplies this Court's holding in *Warden* v. *Hayden,* 387 U.S. 294 (1967), in its effort to justify the court of appeals' improper extension of the mere evidence rule to include *likely sources of evidence* (Pet. App. 6a) (Gov't Br. 6). The court of appeals found it necessary to use this broadened concept, inconsistent with *Warden,* to uphold the seizure of a mass of 20,000 cancelled business checks in 12 cartons which had no appearance as evidence.

Actually, the government's brief ignores the court of appeals' standard of "likely sources of evidence", challenged by the petition. Instead, it discusses a different standard not relevant to this case. The government states that since "it is impossible to know with certainty whether property is in fact evidence of the crimes", it is enough if it "probably is evidence" (Gov't. Br. 6). Though this is an extremely loose approximation of the *Warden* rule, it has no application to the facts of this case. Under no circumstances could it be said that the mass of 20,000 cancelled business checks probably was evidence of crime. Indeed, this is why the court of appeals resorted to its much broader standard of "likely sources of evidence."

Also, the government adopts the same apology used by the district court for Agent O'Neill's seizure of 20,000 checks instead of the four he knew about. The government and the district court, with full knowledge of the remand hearing testimony, explain that the seizure of the 20,000 checks was necessary since Agent O'Neill "was unable on a quick search of them to find the four he was looking for"

(Gov't Br. 6, 8). This is patently implausible on the basis of O'Neill's own testimony at the remand hearing. He admitted knowing specifically the date, amount and payee of each of the checks he wanted long before the raid (Pet. 8-10). He need not have looked at 20,000 checks; he could have gone directly to the checks of the specific dates known to him and quickly collected the few he wanted by using the information about the payee and amounts also known to him.

Since the court of appeals did not review the transcript of the remand hearing, its opinion is based on the incomplete and inaccurate report opinion of the district court. There appears to be no justification for the government, which has filed a copy of the transcript of the remand hearing with the clerk of Court, to perpetuate this inaccuracy.

III.

The third argument of the petition dealing with the failure of the court of appeals to provide an opportunity for review of the remand hearing which it had ordered need not be repeated here. However, the government again misconceives our position since it assumes our complaint is the failure of the court of appeals to provide additional *oral* argument for counsel for petitioners. The petition makes it clear that the issue raised is the failure of the court of appeals, after the remand hearing, to have the expanded record brought before it and to afford counsel the opportunity to argue any new facts or issues produced by the remand hearing (Pet. 30). This argument could have been made orally *or* by brief.

Price v. *Johnson*, 334 U.S. 266 (1947), cited by the government as being contrary to our position is totally inapposite. It deals with the right of an appellate court to deny a prisoner's request to present his own oral argument in a postconviction remedy procedure. The instant case involves the original appeal from a criminal conviction. The court of appeals ordered the remand hearing since it could not resolve the important issues of Fourth Amendment rights because the motion to suppress had been denied without a hearing.

Thus, the court of appeals was without a complete record on appeal. Once the remand hearing was held, there was a completed record which would have permitted the court of appeals to conclude its appellate review. Since the case was but an interrupted appeal, an adversary proceeding at which to present these new facts was as necessary as the initial appellate proceedings before the court. Instead the court of appeals affirmed only on the basis of a deficient report of this remand hearing by the district court without reviewing the completed record or giving counsel an opportunity to present new arguments orally or by brief.

The government has failed to respond to this basic argument.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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